IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1408

* * *

EDDIE MACK GIPSON,

Appellant

V.

THE STATE OF TEXAS,

Appellee

* * *

On Appeal From The
Texas Court of Criminal Appeals

* * *

MOTION TO DISMISS OR AFFIRM

* * *

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of the

1973 Texas Controlled Substances Act, Tex. Rev. Civ. Stat. Ann. art. 4476-15. Appellant specifically questions that portion of the Act providing for felony punishment of two to twenty years in the Texas Department of Corrections and a possible fine not to exceed $10,000 for the acquisition of phenmetrazine. The portions of the Act in question are Tex. Rev. Civ. Stat. Ann. art. 4476-15, §§4.09(a)(3), 4.09(b)(1), 4.01(b)(2), 2.04(a)(d)(4).

B. The Proceedings Below

The Appellant, after the effective date of the 1973 Texas Controlled Substances Act, was convicted of unlawful acquisition of phenmetrazine. Punishment was assessed at two years in the Texas Department of Corrections. However, imposition of the sentence was suspended and the Appellant was placed on probation for two years. Prior to trial, Appellant presented a motion to quash the indictment alleging that the 1973 Texas Controlled Substances Act was in direct conflict with 21 U.S.C. §843, and therefore could not stand under the supremacy clause of the Constitution of the United States. This motion was denied by the trial court. Appellant again presented this contention on direct appeal to the Texas Court of Criminal Appeals. The Court found this contention to be without merit and affirmed the conviction in an unpublished per curiam opinion. It is from this decision that appeal is taken.

II.

ARGUMENT

This Case Does Not Present A Substantial Federal Question

The Tenth Amendment of the United States Constitution expressly reserves to the individual States police power to provide criminal penalties for acts

against the interest of the State. It has been held that "The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975).

Where Congress legislates in a field traditionally occupied by the States, it will be presumed that the police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In 21 U.S.C. §903, Congress clearly stated that State statutes were not intended to be superceded by the Federal Act. It states:

> "No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

Therefore, no substantial Federal question is presented by Appellant's allegation that the Texas Controlled Substances Act provides for a stricter penalty than does the Federal Act.

III.

CONCLUSION

Wherefore, Appellee submits that the questions upon which this cause depend are so unsubstantial as

not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or in the alternative to affirm the judgment entered in this cause by the Texas Court of Criminal Appeals.

Respectfully submitted,

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PROOF OF SERVICE

I, Joe B. Dibrell, Assistant Attorney General of Texas, do hereby certify that three copies of the above and foregoing Motion to Dismiss or Affirm have been served by placing same in the United States Mail, postage prepaid, certified, on this the _____ day of June, 1976, addressed as follows: Dale Ossip Johnson, Attorney at Law, 1206 Perry Brooks Building, Austin, Texas 78701; and, Robert Everett L. Looney, Attorney at Law, 700 Rio Grande, Austin, Texas 78701.

JOE B. DIBRELL